

IN THE COURT OF APPEALS OF IOWA

No. 2-450 / 12-0062

Filed July 25, 2012

**IN RE THE MARRIAGE OF JERRY ALLEN GROTH
AND HEATHER RAE GROTH**

**Upon the Petition of
JERRY ALLEN GROTH,**
Petitioner-Appellant,

**And Concerning
HEATHER RAE GROTH,**
Respondent-Appellee.

Appeal from the Iowa District Court for Ida County, Edward A. Jacobson,
Judge.

A father appeals the physical care provision of the parties' dissolution
decree. **AFFIRMED AS MODIFIED.**

Maura Sailer of Reimer, Lohman & Reitz, Denison, for appellant.

Jay P. Phipps of Thompson, Phipps & Thompson, Merville, for appellee.

Considered by Doyle, P.J., Danilson, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MAHAN, S.J.**I. Background Facts & Proceedings.**

Jerry and Heather Groth were married in 2007. They have one child, a son, who was born in July 2008.¹ Jerry filed a petition for dissolution of marriage on May 13, 2010. A July 21, 2010 ruling on temporary matters placed the child in the joint physical care of the parties, with each party having the child for a week at a time. The parties entered into a stipulation on all financial matters except child support. They disagreed on the issue of physical care of the child, with Jerry requesting physical care and Heather requesting joint physical care.

The dissolution hearing was initially held September 27, 2011. Jerry was twenty-eight years old at the time of the hearing. He lived in Battle Creek, Iowa, with his brother. Jerry had a bachelor's degree in agronomy from Iowa State University. He was employed as a manager in an extensive family farm operation, where he had annual income of about \$100,000. He testified he worked from about 7:00 a.m. to 5:00 p.m. each day. At times, based on the needs of his farming operation, he worked later.

Heather was twenty-nine years old at the hearing. She lived in Ida Grove. Heather has a high school diploma. She operated a daycare from her home, and earned about \$1400 each month. She was taking on-line classes to become a medical assistant.

Much of the testimony at the hearing involved Jerry's allegations that Heather had a serious drinking problem. On December 6, 2009, Heather was

¹ Heather also has a child from a previous marriage. The father of this child was awarded physical care, and Heather was awarded visitation. This child has very serious health problems.

arrested for operating while intoxicated. She had a blood alcohol level of .231. She pled guilty and was sentenced to two days in jail. Jerry presented cancelled checks showing that between December 2009 and April 2010 Heather spent more than \$3000 at Sportsman's Bar in Ida Grove. The bartender, Brenda Aschinger, testified Heather was a regular customer of the bar, and that "quite frequently" she became intoxicated. She testified the last time she saw Heather was five or six months before the hearing.

Trooper Justin Sackett of the Iowa State Patrol testified that on April 23, 2011, Heather was a passenger on a motorcycle that was involved in a high-speed chase. The driver of the motorcycle was Jesse Morgan. Heather was not wearing a helmet on the motorcycle, which at times was going in excess of eighty miles per hour. She admitted she had "quite a few drinks" on that occasion.²

Deputy Sheriff Robert McMillen testified that on July 7, 2011, he pursued a fleeing vehicle. He stopped the vehicle in a farm field, and the driver fled. Heather was one of two people still in the vehicle. Heather lied to the officer about who had been driving the vehicle, stating it was a person she knew only as "Zig." The other passenger told the officer Jesse Morgan had been the driver. When the deputy told Heather she needed to dump out an open container of beer, she started drinking it instead. Heather was charged with public intoxication, open container, and interference with official acts. These charges were still pending at the time of the dissolution hearing.

² A videotape of the chase and stop of the vehicle was made and admitted into the record as petitioner's exhibit 16.

Mindy Hannel was a former friend of Heather's who had testified for Heather at the hearing on temporary matters, but who testified for Jerry at the dissolution hearing. Mindy stated Heather was an excellent mother, but when she wanted to go drinking she would get a babysitter. Mindy testified she and Heather would go out drinking together often and Heather would become intoxicated. Mindy stated she changed her testimony since the temporary hearing because Heather's drinking got worse, to the point it was "ridiculous."

Heather presented the testimony of her brother, Heath Woodward, who stated Heather liked "to have some fun," but he did not believe she had a serious drinking problem. He admitted that "every once in a while," he would watch the child so Heather could go to the bar. Ryan Brookbank, a friend of Heather's, testified that in the last fifteen months Heather had gone out drinking less than ten times, and he did not believe she had a drinking problem. He also stated he had received a citation for minor in possession of alcohol at Heather's house, but Heather had not provided the alcohol.³ Heather provided daycare services for Ashley Schmidt, who testified she dropped her children off at about 5:00 a.m. four days a week and she had never seen Heather affected by alcohol.

Heather testified in rebuttal that she and Mindy were no longer friends and Mindy had a party lifestyle. She stated she had entirely stopped drinking after

³ Ryan did not testify about who had provided him with alcohol when he received the citation for minor in possession. He did testify that Mindy had provided him with alcohol while he was a minor about fifty or sixty times.

she was arrested for public intoxication in July 2011. At the end of Heather's testimony, the court ordered her to have a substance abuse evaluation.⁴

The hearing resumed on October 14, 2011. Heather presented the testimony of Randy Forinash, who owned two bars and a liquor store, including Sportsman's Bar. He testified she regularly purchased meat from him, and the checks were probably for this. Randy testified Heather was in the bar "a few times," maybe once a week. He stated Heather usually had one or two drinks and he had never seen her overly intoxicated. He also stated she had not been in the bar for over a year.

The district court issued a dissolution decree for the parties on January 4, 2012. The court granted the parties joint legal custody of the child and joint physical care. The court found Mindy's testimony was not credible. The court found that while Heather had her drawbacks, she appeared to be a great mother. The court also found the child had done well under the joint physical care arrangement since the temporary order in July 2010. The court noted the parties lived about seven miles from each other and were in the same school district. Jerry was ordered to pay child support of \$1000 per month and to provide the child's health insurance. Jerry has appealed the physical care provision of the dissolution decree.

⁴ The parties both mention the substance abuse evaluation in their appellate briefs. The evaluation, however, is not part of the record on appeal, and we will not consider it. See Iowa R. App. P. 6.801 (noting the record on appeal contains only those documents and exhibits submitted in the district court).

II. Standard of Review.

In this equity action, our review is de novo. Iowa R. App. P. 6.907. In equity cases, we give weight to the fact findings of the district court, especially on credibility issues, but we are not bound by the court's findings. Iowa R. App. P. 6.904(3)(g). We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999).

III. Physical Care.

Jerry contends the district court should have granted him physical care of the parties' child. He claims the court mistakenly applied a presumption in favor of joint physical care. He also claims the court improperly minimized Heather's problems with alcohol, which has led to poor choices in friends and legal problems. He asserts Heather had established a pattern of obtaining babysitters for the child so she could go out drinking. He contends Mindy's testimony was credible and Heather's testimony was not credible. He points out that in the dissolution decree involving Heather's first marriage the court found Heather was less credible than her former spouse.

In determining physical care for a child, our first and governing consideration is the best interest of the child. Iowa R. App. P. 6.14(6)(o). Our objective is to place the child in an environment likely to promote a healthy physical, mental, and social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

A court may grant the parents joint physical care, or choose one parent to be the caretaker of the child. *In re Marriage of Hynick*, 727 N.W.2d 575, 579

(Iowa 2007). The court considers the following factors in determining whether to grant joint physical care: (1) the historical care giving arrangement for the child between the parents; (2) the ability of the parents to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) the degree to which the parents are in general agreement about their approach to parenting. *Hansen*, 733 N.W.2d at 697-99; *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007). There is no presumption in favor of joint physical care. *Hansen*, 733 N.W.2d at 692. The decision to grant joint physical care or physical care to one of the parties must be based upon the best interests of the child. *Id.* at 695.

On our de novo review, we disagree with the physical care decision of the district court. We first note Heather was the primary caretaker until July 2010, when the parties began a joint physical care arrangement. By the time of the dissolution hearing, both parties had been equally caring for the child for more than a year, and we determine the historic pattern of caregiving does not favor one parent over the other. The evidence showed the parties were able to communicate but Jerry no longer had any respect for Heather. While Heather testified the parties got along great, it is clear there was a degree of conflict between them over Heather's drinking and general lifestyle. There was little evidence regarding the parties' approach to parenting.

We base our findings and conclusions in this case on Heather's problems with alcohol, her run-ins with law enforcement, and her serious credibility problems. We note alcohol or substance abuse by one parent is a matter to be considered. See *id.* at 697. The evidence clearly showed Heather's alcohol

usage has become problematic because it has led to interaction with law enforcement officials. When Heather was arrested for operating while intoxicated her blood alcohol level was very high, .231, and the court informed her at the temporary hearing that this alone indicated an alcohol problem. At that time, in July 2010, the court told Heather she needed to modify her conduct.

Heather continued to have problems related to alcohol. In April 2011, Heather was a passenger on a motorcycle that was involved in a high-speed chase. This was a very dangerous situation, and Heather was not wearing a helmet. This incident involved alcohol use by both Heather and the driver of the motorcycle, Jesse Morgan. Also, in July 2011, Heather was charged with public intoxication, open container, and interference with official acts. Her blood alcohol level at that time was .182. This incident also involved Jesse Morgan as the driver. Heather's brother admitted that "every once in a while" he watched the child so Heather could go to the bar. Even if we disregard Mindy's testimony about Heather, there is still plenty of evidence in the record to show Heather has a problem with alcohol.

Heather also has serious credibility issues. In her previous dissolution matter, a different judge concluded in a decision dated May 8, 2007, that Heather was "less credible" than the child's father, Nathan. He stated in the decree that "the damage to Heather's credibility is significant."

This court recognizes the previous decree was filed in 2007. However, Heather's credibility problems continued. Trooper Justin Sackett videotaped the high-speed motorcycle chase on April 23, 2011, involving Heather and Jesse Morgan. Even though the chase was long and Trooper Sackett employed his

siren, Morgan did not pull over for a considerable period of time. Heather then tried to persuade Trooper Sackett that Morgan was not “intentionally running,” despite what appeared on the camera. Trooper Sackett made several observations that Heather was intoxicated, although she was not arrested. A subsequent law enforcement encounter on July 7, 2011, also involved a fleeing vehicle driven by Jesse Morgan. Heather once again attempted to deceive a law enforcement officer. She informed the officer that someone from Odebolt, Iowa, known only as “Zig,” was the driver of the vehicle. Heather additionally told the officer that although the vehicle was owned by Morgan, he was in Minnesota. The other passenger in the vehicle, however, told the officer the truth, that Morgan had indeed been the driver. Heather was arrested for public intoxication, open container, and interference with official acts. Her blood level content was .182.

After reviewing all of the evidence, we conclude the child should be placed in the physical care of Jerry. Heather’s lifestyle, which has involved excessive drinking, problematic friends, and run-ins with law enforcement, is not conducive to the child’s best interests. In addition, she has serious credibility problems. We conclude Jerry can offer the child stability. Jerry testified he previously worked long hours, but since the temporary order, he has arranged his work schedule so he can usually leave work by about 5:00 p.m. each evening. He has strong support from his family. It is clear Jerry has the interest and the ability to parent the child. We conclude physical care with Jerry would place the child in an environment more likely to promote a healthy physical, mental, and social maturity.

IV. Attorney Fees.

Heather seeks attorney fees for this appeal. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Berning*, 745 N.W.2d at 94. Considering these factors, we determine each party should pay his or her own attorney fees for this appeal.

We modify the dissolution decree to place the child in Jerry's physical care. We remand to the district court for a determination of a proper visitation schedule for Heather and a new ruling on the issue of child support. We urge the district court to look into the feasibility and practicality of Heather's offer of free daycare for the child, which would also serve to maximize the child's continuing physical and emotional contact with both parents. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.